

AMENDED IN SENATE MAY 24, 2004

AMENDED IN SENATE MAY 4, 2004

AMENDED IN SENATE APRIL 12, 2004

SENATE BILL

No. 1793

Introduced by Senator McPherson

February 20, 2004

An act to add and repeal Article 6.9 (commencing with Section 20209.20) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1793, as amended, McPherson. Public contracts: design-build contracting: transportation authorities.

(1) Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.

Existing law, until January 1, 2005, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.

This bill would authorize, until January 1, 2010, certain transportation authorities to use a design-build process for bidding on one highway construction project within the jurisdiction of the applicable transportation authority, that includes a requirement that design-build entity bidders provide certain information in a

questionnaire submitted to the transportation authority that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would create a new crime and thereby impose a state-mandated local program.

The bill would require these transportation authorities to report to the Legislature regarding implementation of the design-build process.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(3) This bill would make legislative findings and declarations as to the necessity of a special statute.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 6.9 (commencing with Section
2 20209.20) is added to Chapter 1 of Part 3 of Division 2 of the
3 Public Contract Code, to read:

4
5 Article 6.9. Transportation Authority Design-Build
6 Collaboration Contracts
7

8 20209.20. The Legislature finds and declares all of the
9 following:

10 (a) It is the intent of the Legislature, in enacting this article, to
11 demonstrate an alternative and optional procedure for bidding on
12 one highway construction project each in the jurisdiction of any
13 transportation authority established in ~~the County of Alameda~~
14 ~~under Chapter 5 (commencing with Section 131240) of Division~~
15 ~~12.5 of the Public Utilities Code or Chapter 2 (commencing with~~
16 ~~Section 180050) of Division 19 of that code, the County of San~~
17 ~~Diego under Chapter 2 (commencing with Section 132000) of~~
18 ~~Division 12.7 of the Public Utilities Code, the Santa Clara Valley~~
19 ~~Transportation Authority established under Part 12 (commencing~~
20 ~~with Section 100000) of the Public Utilities Code, the Los Angeles~~
21 ~~County Metropolitan Transportation Authority established under~~

1 Section 130050.2 of the Public Utilities Code, the Santa Cruz
2 County Regional Transportation Commission established under
3 Title 7.94 (commencing with Section 67940) of the Government
4 Code, and the Transportation Agency of Monterey County
5 established under Title 7.92 (commencing with Section 67920) of
6 the Government Code.

7 (b) (1) These transportation authorities should be able to
8 utilize cost-effective options for delivery of highway projects, in
9 accordance with the national trend, that includes authorizing
10 public entities to utilize design-build contracts as a project delivery
11 method while collaborating with employees from the Department
12 of Transportation.

13 (2) Utilizing a design-build contract requires a clear
14 understanding of the roles and responsibilities of each participant
15 in the design-build process. The benefits of a design-build contract
16 project delivery system include an accelerated completion of the
17 projects, cost containment, reduction of construction complexity,
18 and reduced exposure to risk for the transportation authority.

19 (3) This collaborative approach toward the design-build
20 project delivery method should be evaluated for the purposes of
21 exploring the potential for reduced project costs, expedited project
22 completion, or design features not achievable through the
23 design-bid-build method.

24 (c) These projects are subject to the existing process under the
25 state transportation improvement program (Chapter 2
26 (commencing with Section 14520) of Part 5.3 of Division 3 of the
27 Government Code) for planning, programming, environmental
28 clearance, and funding. Projects that are either identified in this
29 article or ultimately chosen for demonstration of the design-build
30 collaboration project delivery method under this article must
31 comply with all existing requirements under the state
32 transportation improvement program for project development and
33 funding. This article shall not confer any type of competitive
34 advantage upon the projects in this article, relative to other projects
35 subject to the state transportation improvement program, during
36 other phases of project development.

37 20209.22. For the purposes of this article, the following
38 definitions apply:

39 (a) “Best value” means a value determined by objective
40 criteria, including, but not limited to, price, features, functions, life

1 cycle costs, and other criteria deemed appropriate by the
2 transportation authority.

3 (b) “Design-build” means a procurement process in which
4 both the design and construction of a project are procured from a
5 single entity.

6 (c) “Design-build entity” means a partnership, corporation, or
7 other legal entity that is able to provide appropriately licensed
8 contracting, architectural, and engineering services as needed
9 pursuant to a design-build contract.

10 (d) “Transportation authority” means any transportation
11 authority established in the County of Alameda under Chapter 5
12 (commencing with Section 131240) of Division 12.5 of the Public
13 Utilities Code or Chapter 2 (commencing with Section 180050) of
14 Division 19 of that code, the County of San Diego under Chapter
15 2 (commencing with Section 132000) of Division 12.7 of the Public
16 Utilities Code, the Santa Clara Valley Transportation Authority
17 established under Part 12 (commencing with Section 100000) of
18 that code, the Los Angeles County Metropolitan Transportation
19 Authority established under Section 13005.2 of that code, the
20 Santa Cruz County Regional Transportation Commission
21 established under Title 7.94 (commencing with Section 67940) of
22 the Government Code, and the Transportation Agency of
23 Monterey County established under Title 7.92 (commencing with
24 Section 67920) of the Government Code.

25 20209.23. For the purposes of demonstrating the design-build
26 collaboration approach, the ~~Alameda County Transportation~~
27 ~~Authority, San Diego Association of Governments,~~ the Santa Clara
28 Valley Transportation Authority, the Santa Cruz County Regional
29 Transportation Commission, the Los Angeles County
30 Metropolitan Transportation Authority, and the Transportation
31 Agency of Monterey County are each authorized to utilize the
32 design-build procurement method for one highway construction
33 project, provided that the project has a total cost of not less than
34 fifty million dollars (\$50,000,000).

35 20209.24. The transportation authority shall implement for
36 design-build projects a labor compliance program as described in
37 Section 1771.5 of the Labor Code, or it shall contract with a third
38 party to implement on the authority’s behalf a labor compliance
39 program subject to that statute. This requirement does not apply to
40 any project where the transportation authority or the design-build

1 entity has entered into any collective bargaining agreement or
2 agreements that bind all of the contractors performing work on the
3 projects.

4 20209.26. Bidding for design-build highway projects shall
5 progress as follows:

6 (a) The transportation authority shall prepare a set of
7 documents setting forth the scope of the project. The documents
8 may include, but need not be limited to, the size, type, and desired
9 design character of the project, performance specifications
10 covering the quality of materials, equipment, and workmanship,
11 preliminary plans, and any other information deemed necessary to
12 describe adequately the transportation authority's needs. The
13 performance specifications and any plans shall be prepared by a
14 design professional who is duly licensed and registered in
15 California.

16 (b) Based on the documents prepared under subdivision (a), the
17 transportation authority shall prepare a request for proposals that
18 invites interested parties to submit competitive sealed proposals in
19 the manner prescribed by the transportation authority. The request
20 for proposals shall include, but need not be limited to, the
21 following elements:

22 (1) Identification of the basic scope and needs of the project or
23 contract, the expected cost range, the methodology that will be
24 used by the transportation authority to evaluate proposals, whether
25 the contract will be awarded to the lowest responsible bidder, and
26 any other information deemed necessary by the transportation
27 authority to inform interested parties of the contracting
28 opportunity.

29 (2) Significant factors that the transportation authority
30 reasonably expects to consider in evaluating proposals, including,
31 but not limited to, cost or price and all nonprice related factors.

32 (3) The relative importance of the weight assigned to each of
33 the factors identified in the request for proposals.

34 (4) If a nonweighted system is used, the transportation
35 authority shall specifically disclose whether all evaluation factors
36 other than cost or price when combined are any of the following:

37 (A) Significantly more important than cost or price.

38 (B) Approximately equal in importance to cost or price.

39 (C) Significantly less important than cost or price.

(5) If the transportation authority reserves the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposals and shall publish separately or incorporate into the request for proposals applicable rules and procedures to be observed by the transportation authority to ensure that any discussions or negotiations are conducted in good faith.

(c) (1) The transportation authority shall establish a procedure to prequalify design-build entities using a standard questionnaire prepared by the transportation authority. In preparing the questionnaire, the transportation authority shall consult with the construction industry, including, but not limited to, representatives of the building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following:

(A) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of bid submission who will participate in the design-build contract.

(B) (i) Evidence that the lead member of the design-build entity has completed a state highway project in California with a value of at least fifty million dollars (\$50,000,000) in the past 10 years.

(ii) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, as well as a financial statement that assures the transportation authority that the design-build entity has the capacity to complete the project.

(C) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(D) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(E) Information concerning workers' compensation experience history and a worker safety program.

(F) A full disclosure regarding all of the following that are applicable:

(i) Any serious or willful violation of Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596), settled against any member of the design-build entity.

(ii) Any debarment, disqualification, or removal from a federal, state, or local government public works project.

(iii) Any instance where the design-build entity, or its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive, or were found by an awarding body not to be a responsible bidder.

(iv) Any instance where the design-build entity, or its owners, officers, or managing employees defaulted on a construction contract.

(v) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law regarding the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contribution Act (FICA) withholding requirements settled against any member of the design-build entity.

(vi) Any bankruptcy or receivership of any member of the design-build entity, including, but not limited to, information concerning any work completed by a surety.

(vii) Any settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity during the five years preceding submission of a bid under this article, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period.

(G) In the case of a partnership or any association that is not a legal entity, a copy of the agreement creating the partnership or association and specifying that all partners or association members agree to be fully liable for the performance under the design-build contract.

(2) The information required under this subdivision shall be verified under oath by the entity and its members in the manner in

1 which civil pleadings in civil actions are verified. Information
2 required under this subdivision that is not a public record under the
3 California Public Records Act (Chapter 3.5 (commencing with
4 Section 6250) of Division 7 of Title 1 of the Government Code)
5 is not open to public inspection.

6 (d) The transportation authority shall establish a procedure for
7 final selection of the design-build entity. Selection shall be based
8 on either of the following criteria:

9 (1) A competitive bidding process resulting in lump-sum bids
10 by the prequalified design-build entities. Awards shall be made to
11 the lowest responsible bidder.

12 (2) A design-build competition based upon best value and other
13 criteria set forth in subdivision (b). The design-build competition
14 shall include the following elements:

15 (A) Competitive proposals shall be evaluated by using only the
16 criteria and selection procedures specifically identified in the
17 request for proposal. However, the following minimum factors
18 shall each represent at least 10 percent of the total weight of
19 consideration given to all criteria factors:

20 (i) Price.

21 (ii) Technical design and construction expertise.

22 (iii) Life cycle costs over 15 years or more.

23 (iv) Skilled labor force availability, determined by the
24 existence of an agreement with a registered apprenticeship
25 program, approved by the California Apprenticeship Council, that
26 has graduated apprentices in each of the preceding five years. This
27 graduation requirement shall not apply to programs providing
28 apprenticeship training for any craft that was first deemed by the
29 Department of Labor and the Department of Industrial Relations
30 to be an apprenticeable craft within the five years prior to the
31 effective date of this article.

32 (v) Acceptable safety record. A bidder's safety record shall be
33 deemed acceptable if its experience modification rate for the most
34 recent three-year period is an average of 1.00 or less, and its
35 average total recordable injury/illness rate and average lost work
36 rate for the most recent three-year period does not exceed the
37 applicable statistical standards for its business category or if the
38 bidder is a party to an alternative dispute resolution system as
39 provided for in Section 3201.5 of the Labor Code.

(B) When the evaluation is complete, the top three responsive bidders shall be ranked sequentially from the most advantageous to the least advantageous.

(C) The award of the contract shall be made to the responsible bidder whose proposal is determined to be the most advantageous.

(D) Notwithstanding any other provision of this code, upon issuance of a contract award, the transportation authority shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the transportation authority's second and third ranked design-build entities.

(E) The written decision supporting the transportation authority's contract award, described in subparagraph (D), and the contract file must provide sufficient information to satisfy an external audit.

20209.28. (a) Any design-build entity that is selected to design and build a project under this article shall possess or obtain sufficient bonding to cover the contract amount for nondesign services, and errors and omission insurance coverage sufficient to cover all design, engineering, and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build project for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(b) Any payment or performance bond written for the purposes of this article shall be written using a bond form developed by the Department of General Services under subdivision (i) of Section 14661 of the Government Code.

20209.30. All bids by subcontractors that were not listed by the design-build entity in accordance with subparagraph (A) of paragraph (1) of subdivision (c) of Section 20209.26 shall be considered by the design-build entity in accordance with the design-build process set forth by the transportation authority in the design-build package. All bids by subcontractors bidding on contracts under this article shall be subject to Chapter 4 (commencing with Section 4100) of Part 1 of Division 2. The design-build entity shall do both of the following:

(a) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements

1 applicable to the competitive bidding process of the transportation
2 authority.

3 (b) Provide a fixed date and time on which the subcontracted
4 work will be awarded in accordance with the procedure
5 established under this article.

6 20209.32. A deviation from the performance criteria and
7 standards established under subdivision (a) of Section 20209.26
8 may not be authorized except by written consent of the
9 transportation authority.

10 20209.34. (a) The local transportation authority shall consult
11 with the Department of Transportation in identifying those
12 demonstration projects to be performed on the state highway
13 system that are described in this article.

14 (b) The Department of Transportation shall establish the
15 parameters for the extent of the participation of its employees in
16 this demonstration program.

17 20209.36. The transportation authority may retain the
18 services of a design professional or construction project manager,
19 or both, who shall serve as an inspector throughout the course of
20 the project in order to ensure compliance with this article. The
21 transportation authority shall be the employer of the inspector. The
22 project inspector shall be fully independent from any member of
23 the design-build entity and may not have any affiliation with any
24 member of the design-build entity or any of the project
25 subcontractors. Quality control inspection for the construction of
26 any highway construction project utilizing the design-build
27 collaboration approach authorized by this article may not be
28 performed by the design-build contractor for the project.

29 20209.38. Nothing in this article affects, expands, alters, or
30 limits any rights or remedies otherwise available at law.

31 20209.40. (a) Retention proceeds withheld by a
32 transportation authority from a design-build entity may not be
33 more than 5 percent of the total bid price if a performance and
34 payment bond, issued by an admitted surety insurer, is required in
35 the solicitation of bids.

36 (b) (1) Except as authorized under paragraph (2), in a contract
37 between the design-build entity and a subcontractor, and in a
38 contract between a subcontractor and any subcontractor
39 thereunder, the percentage of the retention proceeds withheld may



1 not exceed the percentage specified in the contract between the
2 transportation authority and the design-build entity.

3 (2) If the design-build entity provides written notice to any
4 subcontractor who is not a member of the design-build entity, prior
5 to or at the time the bid is requested, that a bond may be required,
6 and the subcontractor subsequently is unable or refuses to furnish
7 a bond to the design-build entity, the design-build entity may
8 withhold retention proceeds in an amount greater than authorized
9 under paragraph (1), from any payment made by the design-build
10 entity to the subcontractor.

11 20209.42. The transportation authority shall submit to the
12 Senate Committee on Transportation, and the Assembly
13 Committee on Transportation, on or before December 1, 2008, a
14 progress report containing a description of each public works
15 project procured through the design-build collaboration process
16 on or before November 1, 2008. The report shall include, but shall
17 not be limited to, all of the following information:

18 (a) A description of the project.

19 (b) The estimated and actual project costs.

20 (c) The design-build entity that was awarded the project.

21 (d) The estimated and actual length of time to complete the
22 project.

23 (e) A description of any written protests concerning any aspect
24 of the solicitation, bid, proposal, or award of the design-build
25 project, including, but not limited to, the resolution of the protests.

26 (f) An assessment of the prequalification process and criteria.

27 (g) An assessment of the impact of limiting retention to 5
28 percent on the project, as required under Section 20209.40.

29 (h) A description of the labor force compliance program
30 required under Section 20209.24, and an assessment of the impact
31 on a project where compliance with that program is required.

32 (i) A description of the method used to award the contract. If
33 best value was the method, the factors used to evaluate the bid shall
34 be described, including the weighting of each factor and an
35 assessment of the effectiveness of the methodology.

36 (j) An assessment of the project impact of the “skilled labor
37 force availability” requirement imposed under clause (iv) of
38 subparagraph (A) of paragraph (2) of subdivision (d) of Section
39 20209.26.

(k) Recommendations regarding the most appropriate uses for the design-build collaborative approach.

20209.44. This article shall remain in effect only until January 1, 2010, and as of that date is repealed.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 3. The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique need of the ~~County of Alameda Transportation Authority~~, *San Diego Association of Governments*, the Santa Clara Valley Transportation Authority, the Los Angeles County Metropolitan Transportation Authority, and the Santa Cruz County Regional Transportation Commission to be able to utilize cost-effective options for the delivery of highway projects.

~~SEC. 4. The design-build authority given to the Los Angeles County Metropolitan Transportation Authority by this act may not in any way limit the 1998 Record of Decision authorization given to the Department of Transportation to design State Highway 710 as part of the freeway gap closure project, or to complete the design of the freeway gap closure to a level determined by the department to be necessary as a prerequisite to bidding out the project as a design-build demonstration project.~~